QUARTERLY REPORT

OF THE

ATTORNEY GENERAL

OF

ALABAMA

For the Period

From October 1, 1945

Through December 31, 1945

Volume 41

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from October 1, 1945, through December 31, 1945.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

WILLIAM N. McQUEEN,

Attorney General.

WETUMPKA PRINTING CO.
Printers and Publishers
Wetumpka, Ala.
1946

1-46—11C & 1C

OPINIONS

October 18, 1945.

Hon. I. J. Browder, Director,

State Personnel Department,

Montgomery 4, Alabama.

Acts 1945, No. 173, H. 311—State Department of Veterans Affairs—Commissioners—Merit System—

(1) The First Assistant and additional assistant State Service Commissioners employed in the State Department of Veterans' Affairs are not within the classified service under the Merit System Law.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of October 12, 1945, is as follows:

"I refer you to the law recently passed by the Legislature creating the Department of Veterans Affairs and I would like to have the following questions answered at your earliest convenience.

"In view of the specific manner of appointment and the salary set by statute provided in this law,

"(1) should the Assistant State Commissioner be covered in the classified service?

"(2) should other assistant State Commissioners be considered in the classified service?

"(3) should the County Commissioners be included in the classified service?

"References are made to the employees to be covered by the Merit System. We are therefore assuming there are no questions about the clerical employees being in the classified service."

The law referred to is Act No. 173, H. 311, approved June 23, 1945, of which Sections V and VI provide for appointment by the State Service Commissioner, with the approval of the State Board, of a First Assistant State Service Commissioner, additional assistant State Service Commissioners, County Service Commissioners and District Service Commissioners, prescribe their qualifications, and further declare that such appointees or commissioners "shall serve as **employees**" and "shall be employees of the State Department, subject to the authority, rules and regulations of the State Board."

Salaries of all such commissioners are fixed by the State Service Commissioner subject to approval by the State Board, with certain limitations as to amount. Section VII.

In Section IV it is expressly provided that "the State Board shall have the power, and it shall be its duty, to fix the salaries and minimum standards of service and personnel of all Service Commissioners; and subject to the State Service System, **wherein** applicable, to fix salaries and minimum standards of service and personnel according to the schedules and rules prescribed by the State Personnel Board of other employees and personnel."

Parenthetically it may be assumed, I think, that the word "wherein" as used above was intended to be "wherever." Otherwise its meaning is obscure and unintelligible.

In said Section IV it is further provided that "The State Commissioner shall appoint all clerical and stenographic personnel in the State Department, and in all county offices as is (sic) authorized or may hereafter be authorized under the State Merit System and approved by the State Personnel Board."

This distinction in the Act between Commissioner-employees and clerical and stenographic employees (or "personnel") or "other employees and personnel," as to which later class "schedules and rules prescribed by the State Personnel Board" and the State Merit System shall apply, indicates, I think, an intention to exclude commissioner-employees from operation of the Merit System Act.

This conclusion is enhanced by the fact that compensation for the services of commissioners is fixed by the State Board itself, as well as "minimum standards of service and personnel," without reference to the Merit System, whereas for other employees "salaries and minimum standards of service and personnel," while fixed by the Board, must be "according to the schedules and rules prescribed by the State Personnel Board."

Had the legislature by this Act intended to place commissioners in the classified service (Code 1940, Tit. 55, § 301, as amended), there was no occasion to make the distinction between them and other employees with respect to fixing compensation and prescribing "minimum standards of service and personnel."

I am of opinion therefore that the First Assistant State Commissioner, the additional Assistant State Commissioners, County and District Commissioners, under the Act in question, do not come within the classified service.

Your assumption as to clerical employees being in the classified service is, I think, well founded.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 24, 1945.

Hon. H. G. Dowling,

Commissioner of Revenue,

Department of Revenue,

Montgomery 2, Alabama.

Sales Tax—Tokens—Department of Revenue—

The Department of Revenue may by regulation discontinue the use of tokens in and about the enforcement of the Sales Tax Law, but is without authority to establish "a bracket system" whereby purchasers of small amounts of goods would be exempt from payment of tax thereon, the purchasers of larger amounts of goods would pay tax at a higher rate than that imposed by law.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of October 11, 1945, is as follows:

"Under the Sales Tax Law, it is made the duty of a retail merchant to pass the tax on to the final consumer and to collect from the consumer the amount due. It is illegal for the merchant to absorb the tax, to refund it, to offer to refund it, or to advertise directly or indirectly the absorption or refund of any portion. Severe penalties are set for a violation.

"Section 786 allows the Department of Revenue, if it deems it necessary, to provide tokens in denominations of one mill and five mills. This provision, it seems to me, is to make possible the nearest accurate collection of the two per cent for which merchants are liable. In the absence of the issuance of such tokens, retailers would be justified, I think, in working out some practicable plan for passing the tax on.

"The tokens now in use are a considerable nuisance and frequent comment upon this fact is heard over the State. Many business men have worked out their private plans for avoiding the use of tokens. For instance, moving picture shows set their ticket price just far enough under some convenient figure to make the admission cost, plus federal tax, plus State sales tax, equal fifteen cents, twenty-five cents, etc. In thousands of establishments in Alabama, such as cafes, drug stores, etc., the token are already practically abolished and a bracket system of collection has been worked out which omits the tax on minor items and collects it as major fractions of pennies on the higher-priced items. With time, this sort of practice becomes more and more general.

"Under the law, would this department be authorized to abolish the tokens and to approve a carefully studied bracket system of collection which would protect the public against exploitation and which at the same time would enable retailers to collect approximately the amount of tax involved in their gross sales? I am sure that we have the right to abolish the tokens. I am practically sure that we do not have the right to order the use of a certain bracket system.

"I am asking your opinion as to the legality of promulgating a system of brackets for tax collection which might be agreed upon between this department and merchants associations after a careful study of the effects. I should appreciate your advice in this matter and shall be glad to discuss it with you before the writing of your opinion, if any details need further explanation."

In my opinion your foregoing conclusions are sound and correct, viz: (1) that by resolution the Department of Revenue may abolish the use of tokens; and (2) that it has no right to order a "bracket system."

I do not think, however, that by agreement between the Department and merchants associations, or otherwise, it is authorized to promulgate "a system of brackets for tax collection."

It is a universal rule of construction that taxing or revenue raising statutes must be construed most favorably to the taxpayer. 59 **C. J.** 1131; **State v. Coastal Petroleum Co.,** 240 Ala. 254, 198 So. 610; **U. S. v. Merriam,** 263 U. S. 179, 29 A. L. R. 1547.

Consequently any variation from the rate of taxation authorized by law upon retail sales (Code 1940, Title 51, § 753) by means of departmental regulation or construction would be invalid, and would in effect amount to administrative legislation. Departmental power to promulgate rules and regulations for the administration of a statute cannot be stretched to include changes in the law itself.

Under the statute itself sale of five cents worth of merchandise is subject to tax of one mill, payable by the purchaser himself to the vendor, (§776) by way of addition to the sales price exacted by the vendor. Any rule or regulation promulgating a "bracket system" whereby such a purchaser would be exempt from payment of the tax, at the expense of a purchaser in a higher bracket, would manifestly be in conflict with the law itself.

If it is desired to attain such a result the remedy should be sought in the legislature.

If on the other hand it is desirable to discontinue the use of tokens I see no valid reason why the vendors of merchandise may not adopt the practice of purveyors of amusement by so pricing their goods that the price plus the tax will amount to a round sum of money.

The department itself is necessarily concerned only with collection from the retailer of the correct amount of tax imposed upon the purchases by the law. It cannot undertake to protect the public from exploitation by the re-

taller. The natural law of competition should be sufficient for that purpose, or if insufficient, the remedy will have to be found by the legislature. The Department of Revenue can look only to retailers' "gross proceeds of sales," and to the "gross receipts" of purveyors of amusement, as disclosed by their records for determination of the correct amount of tax for which they are accountable.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 25, 1945.

Hon. Norvelle R. Leigh, Jr.,

Judge of Probate,

Mobile County,

Mobile 1, Alabama.

Mobile County—Clerk to Board of Registrars—Code 1940, Tit. 17, § 55; Title 62, § 37—Local Acts 1939, p. 298—

Clerk to assist the Board of Registrars of Mobile County is subject to the Mobile County Civil Service System, should be appointed by the Judge of Probate from a list of eligibles submitted by the Personnel Director, with salary, not exceeding $250 monthly, fixed by said Director, on the basis prescribed by Local Acts 1939, p. 298, § XI.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion bearing date of October 19, 1945, is as follows:

"Your official opinion advising me of my right and duty as probate judge of Mobile County, under the situation recited below, will be greatly appreciated.

"Section 55, Title 17, of the 1940 Code in pertinent part provides that:

" 'The judge of probate in all counties having a population of not less than one hundred thousand nor more than one hundred fifty thousand, according to the last or any subsequent federal census, is hereby authorized and directed to employ a clerk to assist the board

of registrars of said county. The duties of said clerk shall be to submit to the board of registrars, revised election lists of said county by placing all persons in their proper ward or precincts and eliminating therefrom all deceased, non-resident and fictitious persons named upon said roll and those convicted of crime, and shall further attend to all clerical work of the board of registrars. He shall be paid a compensation, out of the county treasury, of not more than two hundred and fifty dollars per month, to be fixed by the judge of probate.'

"Although this quoted provision has been in effect since 1931 and Mobile County falls within the designated class, neither my predecessors nor I have made any appointments under it. The members of our present board or registrars claim it is my duty to immediately employ a clerk to perform the duties designated in the quotation, but I am doubtful and uncertain.

"Section 37, Title 62, applies only to Mobile County and reads as follows:

" 'The board of registrars shall meet at the courthouse on the first day of each October and hold daily sessions, Sundays and legal holidays excepted, from and including said date through the succeeding February first, for the purpose of registering voters. Said board shall also meet on the first Monday of April of each year and remain in session daily for thirty days, Sundays and legal holidays excepted, for the purpose of purging the registration list and shall again meet each year on the first Monday after the expiration of one week from the expiration of said last mentioned session and shall remain in session daily for six days for the purpose of hearing objections to striking names from registration lists. Said sessions of the board of registrars in said county shall be in lieu of all other sessions now authorized by law.'

"You will oberve that Section 37 requires the registrars to sit for an additional period of thirty days for the purpose of purging the registration list, and imposes on that board the duty of performing at least some of the services required of the clerk under Section 55, Title 17, if one be appointed.

"Furthermore, the Legislature of 1939 (Local Acts of 1939, Page 298) established a county-wide civil service system for Mobile County. Under this act the personnel board of the County has classified all present clerks and employees of the County officers and with the approval of the board of revenue fixed the number of clerks to which each officer is entitled and prescribed their respective salaries, and no employment has been made without first obtaining the board's approval.

"Will you kindly let me know whether in your opinion the Local Act of 1939, p. 298, removes my right and duty to appoint a clerk under Section 55, Title 17 of the Code, or is it my duty, notwithstanding this local act, to appoint a clerk and fix his salary without the approval of the personnel board? If I have no such duty or authority, is it the duty of

the personnel board to provide for such clerk and fix his salary? If either the personnel board or I have the authority to employ such clerk, will he be an employee of the probate judge or of the board of registrars? I have been under the impression that the local law for Mobile County places all clerks and employees of the County officers under civil service, and repeals all general laws touching the matter, but as stated above, I am in a state of doubt and uncertainty as to just what I can or should do with the request of the board of registrars and shall remain quiescent until I hear from you."

Act No. 251, H. 429, Gen. Acts 1931, page 293 (Code 1940, Title 17, § 55) creates an employment in Mobile County of a "clerk" to assist the Board of Registrars" in said county, with compensation limited to $250 monthly, to be appointed by the Judge of Probate.

Such employment falls within the Classified Service defined in Section 1 of Act No. 470, H. 952, approved September 15, 1939, (Local Acts 1939, page 298). The effect of that Act was not, in my opinion, to repeal the Act of 1931, as codified, but by necessary implication to amend it to the extent indicated, viz. to subject such employment to the provisions of the Mobile County Civil Service System Act of 1939.

Consequently such clerk's compensation within the limits aforesaid, is to be fixed by the Personnel Director as provided in Section XI of the Act of 1939 and the clerk should be appointed from a list of eligibles prepared and submitted by the Director to the Judge of Probate.

Such clerk is in fact an employee of the Board of Registrars to assist them in the performance of their duties as prescribed by Code 1940, Title 62, § 37. Whatever he does in and about revision of the election lists of the county is to be submitted to the Board for approval and review. It is the action of the Board and not of the Clerk, that must be looked to as controlling.

It is my opinion therefore that it is your duty (1) to appoint a clerk from a list to be submitted by the Personnel Director; (2) that the compensation for such clerk is to be fixed by the Personnel Director, not to exceed $250 monthly; and (3) that such clerk is an employee of the Board of Registrars.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 26, 1945.

Hon. E. B. Norton, Superintendent,

Department of Education,

Montgomery 4, Alabama.

County boards of education—Schools—School buses—School funds —Minimum Program Fund. Title 52, Sections 47, 76, and 209, subsection 2b, Code of Alabama 1940.

County Board of Education may transport pupils within two miles of school. Expenses for transporting pupils within two miles of school not a factor in making allotment to county from Minimum Program Fund.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of October 13, 1945, is as follows:

"Superintendent Carl Q. Baxter, Executive Officer of the Etowah County Board of Education, has requested me to ask you if it is legal for a county board of education to transport pupils in county-owned buses at public expense if such pupils are not physically handicapped and live less than two miles from school. Superintendent Baxter's request to me is as follows:

" 'Because of the desire of the Etowah County Board of Education to make school transportation available to pupils who are not physically handicapped and who live less than two miles from the schools they attend, the Board of Education has passed a resolution stating that "starting Monday, October 22, 1945, all pupils who live more than one mile from the schools they attend will be furnished transportation in Etowah County-owned schools buses at public expense."

" 'As Executive Officer of the Etowah County Board of Education, I am requesting you to get a ruling from the Attorney General on the following question: Is it legal for the Etowah County Board of Education to use county-owned buses at public expense to transport pupils who are not physically handicapped and who live less than two miles from schools they attend?' "

You are advised that the Etowah County Board of Education may use county owned buses at public expense to transport pupils who are not physically handicapped (or who are physically handicapped), and who live less than two miles from the schools they attend.

County boards of education have express authority to arrange for the transportation of pupils to and from schools: Title 52, Section 76, **Code of Alabama** 1940, states that:

> "The county board of education shall consolidate schools wherever in its judgment it is practicable, and arrange, if necessary, for the transportation of pupils to and from such consolidated schools, subject to the provisions of this title."

In commenting on this statute the Supreme Court of Alabama said:

> "The general terms in which the duty and authority to install and maintain a transportation system is conferred by Section 76, serves to emphasize the responsibility of the board for arranging for the prompt delivery of the children to and from school, and the very vital matter of conserving their health and safety." **Shores v. Elmore County Board of Education,** 241 Ala. 464, 3 So. 2d 14.

Since the county board has the power to provide for the transportation of school children, it becomes necessary to determine whether or not there is a limitation on this power of the board prohibiting the transportation of pupils who live within a two mile radius of the school they attend. So far as we are able to determine, the only law which attempts to establish a distance beyond which school children may not be transported is found in the law establishing the Minimum Program Fund. Title 52, Sections 208, et seq., **Code of Alabama** 1940.

After outlining certain qualifications that the county must meet in order to participate in the apportionment of State Minimum Program Funds Title 52, Section 209, subsection 2b provides:

> "b. The minimum program allowance for transportation shall be determined as follows for any county: The number of pupils transported on transportation routes approved under regulations of the state board of education shall be multiplied by an amount per pupil which is to be fixed by the state board of education and applied to counties within groups having similar density of population; provided, studies shall be made from time to time to determine whether the cost allowed per pupil or the cost unit should be changed in any or all counties. In determining the amount to be allotted for transportation **no allowance shall be made for transporting pupils who live less than two miles from the school they are attending unless such pupils can be shown to be physically handicapped and to require transportation.** . . . "

We do not think that this statute prohibits the County Board of Education, if it so desires, from transporting pupils within the two mile limit at public expense, if such school funds are available. The added costs, however, required to transport pupils living within the two mile radius of the school must be borne by local funds and cannot be paid out of the Minimum Program Fund. The requirement above quoted merely prohibits transportation costs or expenses for transporting children within the two mile limit from being considered as a factor in determining the amount that the county is to receive from the Minimum Program Fund. It does not follow that the County

Board of Education cannot finance the added costs of transporting those who live closer to the school from local school funds.

It should here be stated that before the county may participate in the Minimum Program Fund, it must be levying and collecting "the constitutional one-mill county school tax, the constitutional three-mill county school tax, and the constitutional three-mill school tax in the several districts covering the whole county, . . . " Title 52, Section 209, **Code of Alabama 1940.**

The receipts from this tax, together with the Minimum Program Fund allotment, are used to finance the Minimum Program including transportation. It cannot be said, however, that all local funds are consumed in meeting the requirements of the Minimum Program.

You are advised, therefore, that surplus local school funds not necessary for the purpose of maintaining the Minimum Program may be used to transport pupils living within two miles of the school they are attending. The added expense of so transporting such children cannot become a factor, and cannot be considered as a factor, in determining the county's allotment from the Minimum Program Fund.

The advisability or the wisdom of transporting pupils who live nearer to the school is primarily a question to be decided by the County Board of Education having a knowledge of local conditions, local funds available and the necessity for such transportation. Should such an enlarged transportation program jeopardize the operation of the Minimum Program financially, or otherwise, or should the added volume of passengers on school buses affect the safety of those riding, the action of the County Board of Education in furnishing such transportation is subject to review by the State Superintendent of Education. Title 52, Section 47, **Code of Alabama** 1940. 20 **Quarterly Report of the Attorney General,** page 202.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

October 29, 1945.

Hon. Roy Johnson,

Tax Assessor,

Jefferson County,

Birmingham, Alabama.

Code 1940, Tit. 51, § 2(c)—American Legion—Tax Exemptions—Code 1940, Title 10, §§ 124 et seq.—

Property of a corporation organized under Code 1940, Title 10, §§ 124 et seq. for the purpose of holding property exclusively for the benefit of a duly organized Post of the American Legion and its members is exempt from taxation under Title 51, § 2(c).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of October 22, 1945, is as follows:

"A corporation is being organized in Jefferson County, Alabama, by a club of War Veterans under Chapter 10, Article 3, Section 124 of the Code of 1940. This corporation will not be a Post of the American Legion, but its object is to own property which will be used exclusively by and for the benefit of a duly organized Post of the American Legion. The corporation will be a non-profit corporation and it will be stated in its certificate of incorporation that it is not organized for financial gain for itself or any of its officers, trustees or members, but is formed as a patriotic, charitable and educational society for furthering the purposes for which the American Legion was organized, and to own and hold property to be used for the benefit of and by the members of a duly organized Post of the American Legion. The corporation will receive no revenue from the use of its property, but the members of the Post of the American Legion will provide the funds for the operation of the home and club facilities and for the maintenance and repair of the property. The Post of the American Legion may charge its members sufficient sums to defray the expenses thereof.

"It seems reasonably clear to me that the property of the corporation is to be used for purposes purely charitable and that as such it is exempt from ad valorem taxes. The project will be a very fine thing for returning veterans and for the community.

"Please advise me whether or not the property of this corporation when used exclusively by and for the members of a duly organized Post of the American Legion will be exempt from ad valorem taxes under Title 51, Chapter 2, Section 2 of the Code of Alabama, or any other laws.

"My attention has been called to an opinion of the Attorney General of Alabama rendered January 17, 1940 concerning property used by Boy Scouts. This opinion appears in the Quarterly Report of the Attorney General for the period from January 1, 1940 to March 31, 1940, Volume 18, page 57, and to certain other authorities, a memorandum of which is attached to this letter."

From the foregoing it appears that the property of the projected corporation "will be used exclusively by and for the benefit of a duly organized Post of the American Legion," and will be "used exclusively by and for the members of a duly organized Post of the American Legion." Your question is whether such property is exempt from taxation under Code 1940, Title 51, § 2.

Among the items so exempt is "all property **owned** by the American Legion or by Veterans of Foreign Wars, or any post thereof, provided that such property is used and occupied exclusively by said organization." (Emphasis supplied.)

In my opinion, for purpose of taxation and exemption from taxation the word "owned" within the purview of the statute should be construed to include equitable as well as legal title. In the present instance it is assumed that the projected corporation will hold legal title to its property in trust for a post of the American Legion and its members and that its articles or certificate of incorporation to be filed pursuant to Code 1940, Title 10, §§ 124 et seq. will disclose that fact as one of its corporate functions.

In **Crow v. Outlaw,** 225 Ala. 656, 145 So. 133, it was held that a person in possession of real property under an executory contract of purchase and sale was "owner" thereof within the purview of Code 1940, Title 51, §§ 21(a) (n) and 39, although legal title to such property was in the vendor. Those sections of the Code should be construed, I think, in pari passu with Section 2 of the same title, to the effect that the words "owned" and "owner," for purposes of taxation and exemption from taxation alike, include the holder of the equitable title, or beneficial interest, in property as well as the holder of legal title. **Ken Realty Co., Inc. v. Johnson, Tax Assessor,** 46 Fed. Sup. 408, 138 Fed. 2d. 809.

This view makes it unnecessary to consider the vexed question whether the property of the projected corporation would be exempt as property "used exclusively *** for purposes purely charitable" under Section 2(a), Title 51. No opinion is expressed as to that, which after all would involve questions of fact and an examination of the certificate of incorporation itself.

This opinion moreover is based upon the understanding that such certificate will show that the corporation's property will be "used exclusively by and for the benefit of a duly organized Post of the American Legion," as stated in your letter, or held in trust for said Post.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 1, 1945.

Hon. N. L. Boyd, President,

Etowah County Board of Revenue,

Gadsden, Alabama.

Judges—Salaries—Act No. 484, Senate 276, approved July 7, 1945—Constitutional Law—

That part of Act No. 484 wherein it reads: "Provided, however, that in those counties where the salaries of such judges are supplemented from county funds, the county contribution shall be decreased by the sum of one thousand dollars per annum from and after this act becomes effective" held unconstitutional and void in that it violates Section 150 of the Constitution of Alabama of 1901.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, dated October 18, 1945, is as follows:

"Re: An Act of the Legislature of Alabama No. 484 (S. 276, Newton, Goodwin) entitled an Act 'to fix the salary of all circuit judges in the State of Alabama at the sum of $6000.00 per annum' which was approved July 7, 1945, and became effective on October 1, 1945.

'I would thank you for an official opinion construing the above and foregoing designated act.

"Etowah County is one of three counties composing the 16th Judicial Circuit. Said circuit has two judges and both of our circuit judges maintain headquarters at Gadsden. Several years ago by a local act of our legislature, the salary of our circuit judges was supplemented by Etowah County to the extent and amount of $800.00 per annum, payable monthly.

"Does the act approved July 7, 1945, and effective October 1, 1945, apply to Etowah County?"

My answer to your specific question is in the negative in that the proviso in Act No. 484, Senate 276, wherein the salary of the circuit judges is decreased in the sum of one thousand dollars when such salaries are supplemented by county funds does not apply to Etowah County.

Due to the fact the question here considered affects other counties than Etowah County, I will discuss generally the act under consideration.

Gen. Acts, p. 121

Act No. 484, Senate 276, entitled "an Act to fix the salary of all circuit judges in the State of Alabama at the sum of six thousand dollars per annum" reads in pertinent part as follows:

"That after the passage and approval of this Act the salary of each and every circuit judge in the State of Alabama, in all the circuits of the State shall be the sum of Six Thousand Dollars ($6,000.00) per annum, and shall be payable out of the state treasury in equal monthly installments as the salaries of other state officials are paid."

The second part and sentence reads:

"Provided, however, that in those counties where the salaries of such judges are supplemented from county funds, the county contribution shall be decreased by the sum of one thousand dollars per annum from and after this Act becomes effective."

A reading of the title of the Act casts doubt on whether it is sufficiently broad or descriptive, as required by Section 45 of the Constitution of 1901, to cover or include in the title the second part or sentence of the Act undertaking to decrease salaries of certain circuit judges payable by counties within their circuits; and of course if the title be not sufficiently broad, that would render unconstitutional the second part and sentence of the Act. Pretermitting discussion of that phase:

Title 13, Sec. 177, of the Alabama Code of 1940, fixes what might be termed the base compensation of all circuit judges in Alabama payable by the State at $5,000.00 per annum by providing:

> "The salary, payable out of the state treasury, of every circuit judge in this state is five thousand dollars per annum, payable in equal monthly installments as the salaries of other state officials are paid."

That Code section also provides that in certain circuits composed of one county but having two judges, each judge shall be paid out of the county treasury an additional sum of $2,000.00 per annum; and also makes provision for additional compensation to certain judges, payable by the county or counties of their respective circuits. That section was amended by Senate Bill 195, Act 104, approved June 12, 1945, so as to provide that in circuits composed of only one county and having only two judges, each judge shall receive additional compensation of $3,000.00 per year, payable by the county.

With respect to the 16th Circuit, Title 62, Sections 357-8 of the Alabama Code of 1940 provide that the salary of each judge of that circuit shall be supplemented out of the treasury of each county composing the circuit, so that each judge shall receive additional compensation of $1,000.00 per annum, such additional compensation to be prorated by the counties of that circuit as prescribed in that Code section.

Thus, it seems evident that by Act 484, approved July 7, 1945, the legislature intended to and did raise the salary of all circuit judges payable by the State from $5,000.00 to $6,000.00 per year. Having done so, the legislature in the second part or sentence of that Act undertook to decrease to the extent of $1,000.00 per year the supplemental salary of certain circuit judges paid by the county or counties of their circuits. These two sentences of this Act are separate and distinct, the one increasing the amount payable by the State, the other decreasing to the same extent the amount payable by the county.

Section 150 of the Constitution of Alabama of 1901 reads:

> "The justices of the Supreme Court, chancellors, and the judges of the circuit courts and other courts of record, except probate courts, shall, at stated times, receive for their services a compensation which shall not be diminished during their official terms; they shall receive no fees or perquisites, nor hold any office, except judicial offices, of profit or trust under this state or the United States, or any other government, during the term for which they have been elected or appointed."

That section prevents the legislature from decreasing or diminishing the compensation of any circuit judge during his term of office, but does not prevent (as do Sections 281 and 68 of the Constitution relating to other officials than judges) the compensation of judges from being increased during their term of office.

The object of Section 150 of the Constitution was stated in State ex rel. Winter v. Sayre, 118 Ala. 1, 29, 24 So. 89:

> "A fixed term of office and compensation incapable of diminution during the term is deemed essential to preserve the independence of the judiciary of the creation of the Constitution."

And in Poyner v. Houson County, 235 Ala. 304, 178 So. 535:

> "Section 281 of the Constitution forbidding any decrease in the salary of a public officer during the term for which he was elected or appointed, as well as Section 150, specially relating to judicial officers, is for the protection of the incumbent."

In construing a statute capable of two constructions, one of which would render it invalid or unconstitutional, and the other valid, the construction which will uphold its validity should be adopted, even though the less natural one.

Blach v. Hawkins, 238 Ala. 172; 189 So. 726;
Wilkinson v. Stiles, 200 Ala. 279; 76 So. 45;
Reynolds v. Collier, 204 Ala. 38; 85 So. 465;
State v. Merrill, 218 Ala. 149; 117 So. 473.

In so far as the Act in question undertakes to decrease the compensation of circuit judges payable by the county or counties of their circuits, as prescribed in Title 13, Sec. 177, of the Code of Alabama, as amended by Act 104, approved June 12, 1945, it is my opinion that the same is violative of Section 150 of the Constitution of Alabama, and that therefore the second part or sentence of that Act, above quoted, is unconstitutional and void.

There is a recognized principle of law that generally a person may not claim and assert a right under a statute and at the same time assert its unconstitutionality, or, in other words, one cannot claim the benefits of a statute and at the same time challenge its constitutionality.

Dillon v. Hamilton, 230 Ala. 310; 160 So. 708;
Larry v. Taylor, 227 Ala. 90; 149 So. 104.

There is likewise a recognized exception to that rule or principle of law.

> "The fact that one would be estopped to challenge the constitutionality of a particular provision of a statute is no bar to such a challenge as to an independent and separable provision of the same Act or a subsequent statute." 16 C. J. S. par. 89, p. 186.

"Those benefits result incidentally from the enactment of other provisions of the Act, the constitutionality of which is not questioned, and which seems clearly separable from the section here challenged."

Thompson v. Consolidated Gas Corp., 300 U. S. 55, 81; 81 L. ed. 510, 524.

Furthermore, the principle of law or estoppal above referred to does not obtain here because the supplemental compensation of the judges of circuits involved, payable by the county or counties of their circuits, is not fixed or created by the Act in question, but on the contrary was fixed and created by law or laws enacted and in force prior to the Act in question. In addition, the supplemental compensation of certain circuit judges payable to the counties within their circuits (Title 13, Section 177, of the Code of Alabama 1940, as amended by Senate Bill 195, Act 104, approved June 12, 1945) is fixed and unconditional. The Act under consideration (Act 484, Senate Bill 276, approved July 7, 1945) undertakes, in the second part or sentence thereof, unconditionally to decrease such supplemental compensation by the fixed amount of $1,000 per year, whereas the increase in the salary of circuit judges fixed by the same Act payable by the state is only a conditional increase and may lapse in whole or in part should it ever become necessary to prorate funds in the state treasury. And, in that event, the circuit judges receiving supplemental compensation from their counties would again suffer a material decrease during the term of their respective offices in their compensation which had been fixed by law. So, for that reason also, the underlying principles of an estoppal are lacking.

"Clearly enough, no principle of justice, good morals or fair play would deny to complainant the right to assail such a provision merely because other parts of the Act constitute a basis for his compensation for specific service."

Houston County Board of Revenue v. Poynter, 236 Ala. 384, 388; 182 So. 455.

Applying the rule of construction above referred to in upholding, if possible, the constitutionality of an Act, it would be the duty of the court to uphold, if possible, the constitutionality of the Act in question. Since the second part or sentence of the Act in question, undertaking to decrease the compensation of certain circuit judges, is unconstitutional and violative of Section 150 of the Constitution, then the whole Act would fall as unconstitutional unless the Act without that sentence can stand. As above stated, it was the evident intent of the legislature to increase the compensation of circuit judges throughout the state, payable by the state, from $5,000.00 to $6,000.00. That intent can still be effected and the legislature's will carried out, even though the second part or sentence, which is unconstitutional, be omitted from the Act.

In my opinion, the two parts or sentences of the Act are separable, as well as the intent of the legislature, and the Act as a whole need not fall merely because the second part or sentence thereof violates Section 150 of the Constitution.

"If the legislative purpose as expressed in the valid portions of the act can be accomplished, independently of the unconstitutional portion, and,

considering the entire act, it cannot be said that the legislature would not have passed the valid portion had it been known that the invalid portion must fail, effect will be given to so much as is good."

Lewis' Sutherland, Statutory Construction, Vol. 1, p. 580.

This same principle is followed by the decisions of our own court, among them being South and North R. R. Co. v. Morris, 65 Ala. 193, 197-8, where our court said:

"We find the principle stated in Cooley on Constitutional Limitations, as follows:

"'Where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, **depending on each other,** operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall.' Cooley's Const. Lim. 177-8; Com. v. Hitchings, 5 Gray, 485. The true test seems to be, 'that if, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.'—Ib. 178."

And in Kentz v. City of Mobile, 120 Ala. 623, 634, where our court adopted with approval and followed the language above quoted.

In Harper v. State, 109 Ala. 28, 32, the court said:

"It is well settled, however, that where a statute contains valid and invalid provisions, and the invalid parts can be stricken from the act and leave an enactment 'complete within itself, sensible, capable of being executed and wholly independent of that which is rejected,' the enactment will be upheld and enforced as to that which is valid." (Citing authorities).

To same effect are:
Ensley v. Cohn, 149 Ala. 316; 42 So. 827
State v. Davis, 136 Ala. 148; 30 So. 344.

Likewise, Section 2 of the Act, which contains the repealer clause, is effective in so far as the increase from $5,000.00 to $6,000.00 per year, payable by the State to circuit judges as prescribed in the Act, conflicts with the compensation of $5,000.00 per year payable by the State to circuit judges as fixed by Title 13, Section 177, Code of 1940.

In conclusion, it is my opinion that the first part or sentence of the Act in question increasing the compensation of all circuit judges payable by the

state from $5,000.00 to $6,000.00 per annum is valid and constitutional; that the second part or sentence of that Act undertaking to decrease to the extent of $1,000.00 per year the supplemental compensation payable to certain circuit judges by the counties within their circuits is unconstitutional and violative of Section 150 of the Constitution of 1901 insofar as such decrease affects the compensation of those judges during their present terms of office; that the supplemental compensation payable to certain circuit judges by the counties within their circuit as fixed and prescribed by Act 104, Senate Bill 195, approved June 12, 1945, amending Title 13, Section 177 of the Code of 1940, remains in full force and effect, and is payable to those circuit judges during their present terms of office as prescribed in that Act.

This opinion is applicable to any circuit in the state wherein the county or counties composing the circuit supplements the salary of the judge or judges.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 1, 1945.

Dr. B. F. Austin,

State Health Officer,

Montgomery, Alabama.

Acts 1945, No. 211, S. 107—Public Hospitals—

Acts 1945, No. 211, S. 107, to establish Statewide hospital system does not violate the Constitution.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of October 26, 1945, is as follows:

"Your opinion is requested as to the constitutionality of Act 211, S. 107, approved July 7, 1945, regular session of the Legislature, 1945.

"Your opinion is requested on the specific constitutional question as to whether or not the State Board of Health in constructing, equipping, maintaining, and operating public hospitals and health centers and related facilities for the treatment of any type of disease as authorized by

said act would be engaging the State in works of internal improvement in violation of Section 93 of the Constitution of 1901."

Act No. 211, S. 107, approved July 7, 1945, authorizes the State Board of Health, as an agency of the State, "to acquire, construct, equip, maintain and operate public hospitals, health centers, and related facilities for the treatment of any type of disease." "Hospital" is broadly defined as including "public health centers and general, tuberculosis, mental, chronic disease, and other types of hospitals, and related facilities, such as laboratories, out-patient departments, nurses' homes and training facilities, and central service facilities operated in connection with hospitals."

For such purposes broad and comprehensive powers are vested in the State agency to accept grants, gifts, and appropriations from the United States and otherwise, to determine the location and distribution of hospitals, fix standards for their construction and operation, and to "contract with the United States Government, any local political subdivision or their agencies, any non-profit association or public improvement society in the acquisition, building, equipping, maintaining, and operation of any public hospitals, health centers, and related facilities for the treatment of any type of disease."

Provision is also made for organization of hospital associations throughout the State to cooperate with the State agency in the execution of its powers, and to be sustained by local appropriations of public funds and acceptance of gifts, donations and endowments.

Thus it appears that the State has undertaken to set up a State-wide plan or scheme to protect the public health and to provide hospital treatment for those of its citizens who have heretofore possibly not enjoyed the benefits thereof.

The question is whether such undertaking on the part of the State violates any provision of organic law embodied in the Constitution. I am of opinion it does not. The Act is but an extension and enlargement of activity heretofore exercised by the State as a public governmental power for the protection of the insane and the poor who are unable to provide for themselves.

Legislation in the public interest for the preservation and protection of the public health has been aptly characterized as follows:

"That the preservation of the public health is one of the duties devolving upon the state, as a sovereign power, cannot be successfully controverted. In fact, among all of the objects sought to be secured by governmental laws, none is more important than the preservation of the public health; and an imperative obligation rests upon the state, through its proper instrumentalities or agencies, to take all necessary steps to promote this object. This duty finds ample support in the police power which is inherent in the state and which the latter cannot surrender. It is as much for the interest of the state that the public health should be preserved as that life should be made secure. ***

"The power granted to administrative boards of the nature of boards of health, to adopt rules, by-laws, and regulations reasonably adapted to

carry out the purpose or object for which they are created, is generally held not to be a delegation of legislative authority in violation of the usual constitutional prohibition. Such a delegation generally comes within the rule that while it is necessary that a law, when it comes from the law making power, should be complete, still there are many matters relating to methods or details which may be, by the legislature, referred to some designated ministerial officer or body, and that all such matters fall within the domain of the right of the legislature to authorize an administrative board or body to adopt ordinances, rules, by-laws, or regulations in aid of the successful execution of some general statutory provision. *** " 12 R. C. L. 1264, § 2, 1265, § 3.

With reference to the nature of hospitals it is said:

"Being generally established through motives of philanthropy and not for gain, having no stock, declaring no dividends, and endowed by public or private donations, hospitals very generally come within the eleemosynary class of corporations, and when governed directly by the state, and conducted by officers and agents of the state, they are strictly public corporations or governmental agencies, and are entitled to the immunities afforded other public corporations. *** " 13 R. C. L. 939, § 3.

In view of these long recognized principles of law I find no objections to the Act in question by reason of Section 93, as amended, of the Constitution, forbidding the State from engaging in works of internal improvement and from being interested in any private or corporate enterprise. The business of owning and operating hospitals as defined by the act (§ 1), while heretofore confined in large measure to "private or corporate enterprise," is none the less, as appears above, "when governed directly by the State, and conducted by officers and agents of the State" an exercise of the police power, and a recognized governmental function.

I am of opinion therefore that the act in question does not offend Section 93 of the Constitution or any other provision thereof.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 2, 1945.

Hon. C. M. Pinson, President,

Commission of Jefferson County,

Birmingham 3, Alabama.

Code 1940, Tit. 10, §§ 124, et seq.—Museums—Counties—Cities—Constitution 1901, § 94.

A county or city is not authorized to appropriate money to an association or society organized under Code 1940, Tit. 10, §§ 124, et seq., to establish and maintain a museum, although its board of trustees may be composed in part of the presidents of the city and county commissions ex officio, and the corporation was not formed for the purpose of making profits.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of October 30, 1945, is as follows:

"I beg to advise that the Birmingham Museum of Science has been incorporated in Jefferson County, Alabama, under the provisions of Article 3, Chapter 7 of Title 10 of the Code of Alabama of 1940. The purpose for which the corporation was organized is for the establishment and administration of a museum devoted to the benefit of the people of Birmingham and Jefferson County, Alabama. Under the terms of the Constitution and by-laws the presidents of the county and city commissions, together with the superintendents of county and city schools, serve as ex-officio trustees. The corporation was not formed for the purpose of making profits.

"It has been suggested that the majority of support for this institution may be obtained by direct appropriation from the city and county. For your further information the corporation in question plans the establishment of a museum devoted exclusively to the natural sciences.

"A request has been made to the county commission for a direct appropriation payable to the Birmingham Museum of Science, the proceeds of which will be used by the officials of said corporation in and about the establishment and administration of said museum. Under such an appropriation the county commission would have no authority over the expenditure of the funds except as above stated the president of this commission would serve as one of the ex-officio trustees.

"I desire your opinion as to whether the county commission can make such an appropriation to the Birmingham Museum of Science and in this connection I call your attention to Section 511 of Title 37 of the Code of Alabama of 1940 which apparently gives to any city or town or county of six thousand population and over the authority to acquire, establish and maintain public museums."

From the foregoing it appears that the Birmingham Museum of Science was incorporated pursuant to Code 1940, Title 10, §§ 124, et seq., presumably as a society "for promoting knowledge, promoting arts, promoting sciences." It is a private corporation, although it "was not formed for the purpose of making profits," and although under its constitution and by-laws the presidents of the county and city commissions, together with the superintendents of county and city schools, serve as ex officio trustees.

Such presidents and superintendents in the exercise of their powers as such trustees are not engaged in the performance of any duty imposed upon them by law, and do not exercise any governmental power. Whether in addition to such trustees there are also other trustees does not appear.

Inasmuch as the corporation, society or association is a private one any act of legislature or statute purporting to authorize any county or city to appropriate public funds in aid of or to the association or corporation would violate Section 94 of the Constitution of 1901 and be void.

Therefore, Section 511, Title 37, Code 1940, to which reference is made, and which is a confused codification of Act No. 151, S. 66, approved April 21, 1936, Acts 1936, Ex. Sess., p. 168, cannot be construed as authorizing the county or city to appropriate funds in aid of the aforementioned association or corporation. Nor can any such appropriation by the county find support in Sections 224-226 of Title 12 of the Code, relating, among other things to museums maintained by counties.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 6, 1945.

Hon. Floyd Forman, Chairman,

Macon County Board of Revenue,

Tuskegee, Alabama.

Code 1940, Title 12, § 7—County Commissions—

1. A court of county commissioners is not authorized to grant one of its members leave of absence in order that he may accept employment by the county which the statute forbids.

2. A member of the court of county commissioners may not by refusal to accept compensation for his services as such member render himself eligible to discharge the duties of another office.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of November 2, 1945, is as follows:

"The Macon County Board of Revenue has authorized me to write you requesting an opinion of our authority under the following facts:

"One of the County Commissioners, duly elected to his office, wishes to obtain the position of superintendent of construction of farm-to-market roads, which will be constructed in this county in the near future, and for which position he is well qualified.

"The questions presented by these facts are:

"1. Does the Macon County Board of Revenue have authority to grant him a leave of absence from his District as County Commissioner for a long period of time in order to do the work?

"2. If the Board does not have such authority, does the Commissioner have the right to refuse to accept his salary as commissioner and accept the position as superintendent of the road construction, holding both positions, but accepting compensation only as superintendent of construction?"

Code 1940, Title 12, § 7 provides without qualification or exception that "no county commissioner is eligible to or must discharge the duties, either as principal or deputy, of any other office." I am of opinion, therefore, that such commissioner may not by refusal to accept compensation for his services as commissioner avoid the positive mandate of the statute. See also Section 211, Title 41, Code of 1940.

Nor do I find any provision of law whereby a court of county commissioners may grant one of its members "a leave of absence *** for a long period of time," in order that he may accept employment by the county which the statute forbids.

The answer to both questions is "No."

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 8, 1945.

Hon. Frank R. Stewart, Superintendent,

Cherokee County Board of Education,

Centre, Alabama.

Schools—County Boards of Education.

The county board of education may legally expend school funds for the equipment of school lunch rooms.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of October 30, 1945, is as follows:

"Is it legal to pay for equipment for school lunch rooms with school funds? We request an opinion since the question has been raised by the examiner who is checking the superintendent's books in Cherokee County?

"The equipment purchased is such things as refrigerator, ranges, knives, forks, pans, plates, cooking utensils, etc.

"We request an opinion at your earliest convenience."

County school funds are public funds and may only be expended by the county board of education for "public school purposes."

The question of the authority of the county board of education to make an appropriation to the county health departments to be used for public health services connected with the school system was considered in an opinion of this office rendered to Dr. A. H. Collins, State Superintendent of Education, under date of September 9, 1938, and found in Biennial Report of the Attorney General, 1936-1938, page 783. In holding that the county board of education had authority to make such appropriation, it was said in this opinion:

"The question now arises as to whether or not an appropriation to the County Health Department for the exclusive use and benefit of the schools by the County Board of Education for public health services is an appropriation for 'public school purposes.' By Sections 8, 86, and 98 of the School Code of Alabama, educational matters affecting the county school system and the general administration and supervision of the public schools and of the educational interests of each county, are vested in and are under the control of the County Board of Education. The purpose of the entire educational system is to maintain efficient free public schools within the State of Alabama and within each county. As will be shown, the protection and promotion of the health of the school children is a necessary adjunct to this expressed purpose and in my judgment the county boards of education by implication possess the power to make such appropriations as are required to accomplish that purpose. To paraphrase the statement in **State v. Brown,** 123 N. W. 294, education of a child means much more than merely communicating to it the contents of text books, but even if the term were to be so limited, some discretion must be used by the teacher in determining the amount of study of which each child is capable. The physical and mental powers of the individual are so interdependent that no system of education, although designed solely to develop mentality, would be complete which ignored bodily health. In line with these principles there has been established in the Department of Education a division of physical health education (Section 20 of the School Code, 1927), and Article XL (Sections 619-625) of the School Code of 1927 provides for the cooperation of county boards of education with county boards of health in the promotion of a physical program for the school children of the county."

In many of the public schools of the State lunches are served to the students. However, destitute children are served lunches without charge. The cost of the food and the expense of the preparation is not paid for from county school funds but by appropriations from the counties and the federal government. The purpose of serving these lunches is in the interest of the health of the students.

It has been held by this office that the county board of education may legally pay from school funds the cost of transportation of commodities furnished by the works project administration to be used in furnishing lunches to destitute children. Quarterly Report, Volume 22, page 199.

In this opinion it was held that, "contributing the cost of transportation of the commodities used in furnishing lunches to destitute school children is really contributing school funds to the health and physical education of the destitute school children which is an important part of their education."

It is my conclusion that the expenditure of school funds by the county board of education for the purpose of equipping school lunch rooms is an expenditure of such funds for the health of the student and for this reason such expenditure is for "public school purposes."

In view of the above conclusions, it is my opinion that school funds may be legally expended for the equipment of school lunch rooms.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 13, 1945.

Mr. John Graves,

State Comptroller,

Montgomery, Alabama.

Officers—Constitution, Sections 280, 150—Terminal leave—

An officer on terminal leave from the Army of the United States may resume any civil office he held prior to entering the armed forces and receive pay from the State regardless of the fact he is also receiving pay from the Government while on terminal leave.

Opinion by the Attorney General.

Dear Mr. Graves:

I have your letter of 8 November 1945, requesting my opinion upon the following question:

> "May a circuit judge of Alabama, who is the regularly elected judge, and who became an officer of the Army of the United States during the pendency of his term as judge, taking leave from his office of judge under the provisions of the Act of the Alabama Legislature, approved November 20, 1942, and who has been placed on terminal leave by the Army, validly resume the duties of his office as circuit judge and be paid the regular compensation provided for such office during the period of such terminal leave, in so far as the validity of such resumption of duties and right to payment of compensation is affected by Sections 280 and 150 of the Alabama Constitution"?

My answer to your question is in the affirmative.

Section 280 of the Alabama Constitution will be considered first. Section 280, so far as relevant, reads as follows:

> "No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under this state . . . "

The question is whether or not an officer of the Army of the United States is the holder of an "office of profit" under the United States during the period that he is on terminal leave.

The legislative policy of Alabama is a proper and important factor to be considered. I now quote the pertinent statutes of Alabama:

Section 37 of Title 35 of the 1940 Code of Alabama is as follows:

> "Any citizen of this state may accept and hold a commission or warrant in the national guard or naval militia of Alabama or hold enlisted membership in the national guard or naval militia, or a commission in the officers' reserve corps of the army of the United States, or naval reserve of the United States without vacating any civil office, position, or commission held by him; and the acceptance or holding of any such military or naval commission or membership and receiving pay therefrom shall not constitute such holding of an office of privilege and trust under the government of this state and of the United States as shall be incompatible with the holding of any civil office, legislative or judicial, or position or commission under the government of this state."

Section 12 of Title 35 of the 1940 Code of Alabama is as follows:

> "All officers and employees of the State of Alabama, or of any county, municipality or other agency or political subdivision thereof, who shall be active members of the Alabama national guard or naval militia, or of

the officer's reserve corps of the United States army, or of the United States naval reserves, shall be entitled to military or naval leave of absence from their respective civil duties and occupations on all days that they shall be engaged in field or coast defense or other training or on other service ordered under the provisions of this chapter, or of the national defense act, or of the federal laws governing the United States naval reserves, without loss of pay, time, efficiency rating, annual vacation, or sick leave, but no such person granted such leave of absence with pay shall be paid for more than twenty-one working days at any one time."

Although the title of an officer of the Army of the United States is not precisely the same sort of title as is held by the military personnel mentioned in the foregoing sections, these sections constitute a legislative intepretation that military service of a temporary nature is not holding an office of profit within the meaning of Section 280 of the Alabama Constitution. To the effect that the legislative interpretation as respects the type of military service mentioned in the statutes quoted above is applicable to officers of the Army of the United States, see In Re Advisory Opinion to Governor (N. C.) (1944) 28 SE (2d) 567, the opinion in which is quoted in part is a later part of this letter.

I next come to the Act authorizing leaves of absence for Alabama civil officers during the time of their service during the late War. The Act of the Alabama Legislature, approved November 20, 1942, passed at the extraordinary session which began November 16, 1942, provides

(1) that "the tenure of any temporary acting official appointed under the provisions of this Act shall be **during the absence of** the regularly elected or appointed official while in military service . . . "; and

(2) that nothing contained in the Act shall be deemed to entitle the regularly elected or appointed official "to any compensation **during the time he is absent in the military service** of the United States and until he resumes the duties of his office, nor shall any such official be clothed with any of the powers or authority of his office **while absent in the military** service."

"Absence," "during the time he is absent," and "while absent," are the important words. I think that "absent" and "absent" in this connection mean such a being away as rendered the official physically unable to perform the duties of his civil office. Certainly, the circuit judge would not be 'absent" if he is at home on terminal leave. He would be able, ready, willing, and in no way incapacitated or disabled to perform the duties of his judgeship. He would certainly not be absent.

Legislative interpretation of the Constitution deserves and usually receives the high respect of the courts.

I now pass to judicial interpretation of constitutional provisions similar to Section 280.

A provision such as Section 280 "will be reasonably construed with reference to . . . the incompatibility sought to be prevented" 46 C. J., p. 943, note

17. In In Re Advisory Opinion to Governor (1944) (N. C.) 28 SE (2d) 567, there was involved a constitutional provision stating that "No person who shall hold any office of profit or trust under the United States, or any department thereof, or under this state, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this state, to be eligible to a seat in either house of the general assembly: Provided, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissoners for special purposes." Interpreting this provision as designed to prohibit the holding of incompatible offices, the court held that the fact the services of a controller of the state Board of Education as Captain in the Army of the United States are of a temporary nature rather than a permanent nature saved the situation from the claim of incompatibility which would result if the services were those of a professional soldier as distinguished from those of a temporary citizen soldier.

A provision such as Section 280 does not prevent a civil officer from exercising "a function which is merely transient, occasional or incidental" (46 C. J., p. 943, note 26); nor does such a provision "apply to a temporary position." 46 C. J., p. 943, note 27.

Since the beginning of the National Emergency, many state courts have been called upon to interpret provisions similar to section 280 of the Alabama Constitution. The great weight of these decisions, and certainly the better considered ones, hold that a constitutional provision such as section 280 is not applicable to a civil officer who entered the military service of his nation during the late war for service during the emergency.

There are a series of annotations in A. L. R., dealing with this questoin: 26 A. L. R. 138; 132 A. L. R. 254; 147 A. L. R. 1419; 148 A. L. R. 1399; 150 A. L. R. 1444. Of these, the annotation at 147 A. L. R. 1419 contains the most comprehensive summary of decisions. The annotation at 150 A. L. R. 1444 is also a good one. A study of the decisions cited in these annotations indicates a growing tendency upon the part of the courts to interpret constitutional provisions similar to section 280 so as not to unnecessarily injure the civil officer who has entered the military service in time of war, for the purpose of serving only until the peril to his nation is terminated. Several decisions are worthy of especial note, so I will now deal with them.

A person holding a temporary appointment as an officer in the Army in time of War, as distinguished from a professional soldier, was held in State ex rel Thomas v. Wysong, (1943) (W. Va.) 24 SE 2d 463, eligible to hold the office of attorney general in spite of a constitutional provision to the effect that "none of the executive officers mentioned in this article shall hold any other office during his term of service", the court saying:

> "We would hesitate to impute to the framers of our Constitution an intent to deprive citizens of the emoluments and honors of a civil office on the ground that they are engaged temporarily in military service in time of war. No such result was intended or reached in the framing and adoption of our Constitution. We are cognizant that the Constitution of the state is operative in War as in peace, and we would not subtract an iota from that principle of our organic law. Moreover, no provision of the

Constitution should be so absurdly construed as to penalize a citizen on account of his efforts to maintain it."

A constitutional provision to the effect that "no person, while holding any office under the United States Government, shall hold any office under the state government" was held in Critchlow v. Monson (Utah—1942) 131 Pac. 2d 794, not to be directed against officers in the military service of the United States, serving only for the duration of the war, and returning on its termination to civilian pursuits, the court saying:

"We therefore hold that the constitutional provision in question . . . was designed to prevent practices which would tend to undermine the stability of our state government, and it was aimed at political office seekers, particularly those who might seek to draw two full-time salaries from positions incompatible and impossible to perform simultaneously without neglecting performance of the duties of the state office. We hold that the provision has no reference to those who are called to military duty during time of war or national emergency, who plan to be absent from duties in this state no longer than the emergency reasonably requires."

In McCoy v. Los Angeles County (1941) 18 Cal. (2d) 193, 114 Pac. (2d) 569, the Court said:

"It was never the intent or purpose of article 4, section 20, of the Constitution of this state (providing that 'no person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this state . . .') to discourage public employees from rendering military or naval service, to deter them from answering, or induce them to evade such a call, or to tend to impede the Federal Government in its effort to mobilize the citizenry, or interfere with efforts to meet a major emergency. The constitutional provision can neither be construed nor applied to effect such a result. Its primary object, as declared in the early case of People ex rel. Marshall v. Leonard (1887) 73 Cal. 230, 14 P. 853, is to prohibit a conjunction of a Federal and a state office of profit in the same person, without any condition whatsoever; that is, to prevent 'dual office holding by one person under two separate and distinct governments, and the separation of the allegiance justly due one by its officers from that due to another power.' The reason for the prohibition ceases and the constitutional provision is inapplicable in a case where the duties, compensation, and rights of the holder of a state office, and his opportunity to exert any influence therein, are suspended and inchoate while he is rendering temporary patriotic service to his country under a military or naval commission."

A provision excepting officers in the militia from the operation of a constitutional prohibition against holding an office of trust or profit under the United States and the state at the same time should be interpreted, according to the opinion in In Re Advisory Opinion to Governor (1944) (NC), 28 SE (2d) 567, not according to the letter of the provision but rather according to the reason for its adoption and its spirit; and as thus construed, it was held that a state offiecr, namely, the Comptroller of the State Board of Education, did not vacate his office when he accepted a temporary officer's commission as a Captain in the Army of the United States. The court said:

"It was the purpose of the proviso in this section to permit public officials to serve as officers in the militia without forfeiting their civil office, and it is reasonable to suppose that as the interdiction in the first part of the section was not intended to extend to civil officers serving as officers in the militia, for precisely the same reason it was not intended to extend to civil officers holding temporary commission in the Army during a war emergency, as they both fall in the same category. Both would be temporarily engaged in bearing arms in defense of the commonwealth and in like positions. To declare otherwise would be to say that an unwarranted discrimination inheres in the Constitution, whereas the pervading principle of the organic law is equality of treatment. The thesis of the Constitution is that all similarly situated are entitled to like treatment from the government they support and defend."

In People v. Sischo (1943), 23 Cal. (2d) 478, 144 Pac. (2d) 785, 150 A. L. R. 1431, a proceeding in quo warranto to test title to office of a superior court judge who had accepted a temporary or reserved commission in the Army of the United States, the claim was made that because of a constitutional provision that no person holding a lucrative office under the United States should be eligible to a civil office for profit under the State, the superior court judge, by accepting a commission as an officer in the Army of the United States, had automatically created a vacancy in the office of superior court judge. The court held, with respect to the constitutional provision above mentioned, as well as a constitutional provision that the legislature should have no power to grant leave of absence to any judicial officer and that any such officer who should be absent from the State for more than sixty consecutive days should be deemed to have forfeited his office, that it was not the intent and purpose of the constitutional provisions to discourage public employees from rendering military or naval service.

Again in Caudel v. Prewitt (1944) (Ky.), 178 SW (2d) 22, the court construed a constitutional provision against holding more than one office of trust or profit at the same time, as giving a civil office holder the right to resume the functions of his office after being called upon to serve his country temporarily under an emergency (but not professionally), even though in doing so he might function as an officer in the temporary defense of his country. The court said that the constitutional provision in question was not meant to deprive a civilian office holder of his office when he was temporarily fighting to preserve intact the same Constitution of which the section was a part.

Although the precise point to which these decisions were directed is the question whether an officeship in a temporary Army was an office under the United States within the meaning of a state constitutional provision similar to section 280, it stands to reason all the more that an officer of the temporary Army who is on terminal leave is not holding an office under the United States within the meaning of Section 280.

Terminal leave is a leave which is given an officer with an order that he revert to an inactive status immediately upon the expiration of the period of such leave. The period of such leave is equal to the accrued but unconsumed time to which the officer is entitled to leave, and would have previously received as leave except for the fact that the Army had need for him to be at work, and hence was unable to grant him the leave for such time.

Although he is compensated at his usual rate of pay during the period of the terminal leave, he is relieved of the performance of work, and permitted to be at his home. It is believed that in practice, the Army expects no more of an officer while he is on terminal leave, than that he demean himself as a gentleman. The leave called terminal leave is simply a device for compensating the officer for the time that in the usual course of things he would have been given leave from duty, but which by reason of the necessity for his services, the Army was unable to let him have. Under the authority of Charges No. 3 (dated April 18, 1945) to Army Regulation 600-40, "Military personnel on terminal leave or retirement furlough may at their option wear civilian clothing during such period". Although technically, the officer while on terminal leave is in an active status, the motives which impelled the creation of terminal leaves, coupled with the freedoms which he enjoys while on such a leave, including the especially significant privilege of wearing civilian clothing, reduces the technically active status to a fiction. The officer's status while on terminal leave is vastly different from his status while on an ordinary leave granted in contemplation of his return to active service. It is of no consequence that the officer while on terminal leave is subject to being ordered back to normal regular duty. That is a liability to which such officer is subject even after his reversion to inactive status; and that liability is no impediment whatever to his resumption of the duties of a civil office under the State of Alabama.

During the period of the terminal leave, there is nothing in the officer's connection with the Army that would incapacitate or hinder him in the performance of the duties of the civil office of judge under the State of Alabama. If section 280 be conceived of even as expressing a public distaste for the same person receiving compensation from two governments for the same period of time, the status of an officer of the Army of the United States holding a civil office under the state would not incur such distaste for the reason that the pay given by the United States to the officer for the period of his terminal leave is in reality a compensation for services performed prior to his placement on terminal leave (that is, for time that he worked instead of being at play), and has more the quality of a bonus than of compensation for services performed during the period of terminal leave.

Firmly supportive of the opinion above expressed is the able opinion of the Attorney General of Oregon, rendered on October 23, 1945, to the Department of Veterans' Affairs of Oregon. Up for interpretation was a provision of the Oregon Constitution which authorizes state loans to veterans of World War II, subject to certain conditions, one of which is that the veteran be "honorably separated or discharged" from the military service. Holding that a captain of the Army of the United States while on terminal leave should be considered as "honorably separated or discharged", the Attorney General said:

> "It seems quite clear to me, in considering §§ 1 and 3 of article XIa of the constitution together, that it is not necessary that a person shall have received the document labelled an 'honorable discharge' in order to qualify for a loan. In fact, I am informed that ordinarily, commissioned officers do not receive any such document when they are separated from the service. The person to whom you refer has received what is commonly called a 'separation notice' and it is by virtue of the order contained in that notice that he is on terminal leave. Actually such notice evidences

the fact that he is separated from the service under honorable conditions. It is true that technically he is carried on the rolls of the separation center until the end of his terminal leave when he is automatically relieved from active duty. In this case, such date is December 13, 1945. It is true that he will be paid compensation as a captain until the end of his terminal leave; however, such pay is not for services that he is rendering during the period of such leave, but pay that is owing to him for services previously rendered."

An interpretation of section 280 as forbidding the circuit judge to resume the duties of his judgeship under Alabama during the period of his terminal leave would be an interpretation of the most rigid and unreasonable literality. As indicated above, such has not been the course of the courts in dealing with provisions similar to section 280. The Alabama Supreme Court has said of the Alabama Constitution that "narrow or literal constructions are not indulged except in favor of elemental rights or settled principles of republican government" and that it does not look with favor upon a contention that "carries no appeal to a just sense of constitutional values". Bouchelle v. State Highway Commission, 211 Ala. 474, 100 So. 884. Also apposite is the expression of the Court in Jefferson County v. Hawkins, 232 Ala. 398, 168 So. 443: "Sometimes the letter would crucify the spirit. Such results are to be avoided."

The decision in Chisholm, Comptroller v. Coleman, 43 Ala. 204, is not inconsistent with and does not militate against, the argument and opinion expressed above. The Chisholm case merely held that a circuit judge initially holding title to his office under the "legal" State of Alabama, forfeited his office by his entry into the military service of the Confederate States, and hence was not entitled to receive compensation from the legal State of Alabama, as for service as circuit judge subsequent to his entry into such military service.

In addition to section 280 of the Alabama Constitution, section 150 must also be considered. So far as relevant to the question under discussion, it provides that circuit judges shall not

> "hold any office, except judicial offices, of profit or trust under this state or the United States, or any other government, during the term for which they have been elected or appointed".

I entertain no doubt whatever that this constitutional provision, in so far as the question propounded in your request is concerned, should and must be given precisely the same interpretation as section 280. The same reasons which render section 280 inapplicable to the situation specified in your letter also render section 150 inapplicable.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 19, 1945.

Hon. Chauncey Sparks,

Governor of Alabama,

Montgomery, Alabama.

Constitution 1901, Section 120—Title 29, Sections 9, 259 and 260, Code of Alabama 1940.

1. The Governor has authority, under the provisions of Section 120 of the Constitution of 1901 and Title 29, Sections 259 and 260, Code of Alabama 1940, by executive order to coordinate the law enforcement agencies of the State under the Department of Public Safety.

2. The Governor under such authority and by such executive order may establish under the Department of Public Safety the Alcoholic Beverage Law Enforcement Division, and may appoint such officers and employees as are necessary for the proper functioning of such Division.

3. All claims against the funds of the Alabama Alcoholic Beverage Control Board arising from the operation of the Alcoholic Beverage Law Enforcement Division may be paid from such funds upon proper resolution adopted by the Board.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of November 14, 1945, is as follows:

"Attached I hand you:

"(a) Copy of an order which I propose to issue activating the Department of Public Safety under the Director of Public Safety, which the law allows me to appoint. This activation consists of placing certain law enforcement agencies under the Department, but separately functioning, for the purpose of efficiency and economy in the administration of the laws of the State;

"(b) Copy of a resolution for consideration and passage by the Alabama Alcoholic Beverage Control Board with reference to transfer of the law enforcement agency of the Board to the Department of Public Safety.

"I wish you to advise:

"1. Legality of the order mentioned.

"2. The effective wording of the order.

"3. The necessity of the resolution as suggested for consideration by the Alabama Alcoholic Beverage Control Board.

"4. The authority of the Alabama Alcoholic Beverage Control Board to pay its agents and employees, though acting under the direction and supervision of the Department of Public Safety, out of funds from which it has heretofore paid them."

Section 120 of the Constitution of 1901 provides: "The Governor shall take care that the laws be faithfully executed."

The office of the Governor does not exist by virtue of the common law. It exists only by virtue of the Constitution of the State. The Executive is charged with the authority and power of causing the laws to be duly executed and granting commissions to all the officers of the government for the benefit of the people as a whole.

The Section of the Constitution above referred to is broad and sweeping, and there seems to be no limitation upon the power of the Governor to faithfully execute the laws. Notwithstanding this broad and sweeping power granted by the organic law, the Legislature has deemed it advisable to enact a law in furtherance of and clarification of the constitutional provisions alluded to. Such expression of the Legislature is found in Title 29, Sections 259 and 260, Code of Alabama 1940, which Sections are as follows:

"§ 259. Governor executive head of law enforcement; may require reports from all officers charged with duty of enforcing law.—In order for the governor to perform the duties imposed upon him by the constitution, that he shall take care that the laws be faithfully executed, he is made the executive head of the law enforcement machinery of the state, and is charged with supervising and directing the enforcement of the laws of the state for the promotion of temperance and the suppression of the evils of intemperance, and he is authorized to supervise, direct and give orders to any and all officers of the state or of any county in the state, in regard to the exercise of their powers in the performance of their duties in respect to the enforcement of said laws. The governor may, as he deems desirable, call upon said officers for reports to be made directly to him, concerning any action they may have or may not have taken in enforcing said laws, and for reports concerning conditions that may exist, calling for increased diligence in reference to said law enforcement, and all such officers shall strictly obey his orders and directions and make any reports called for, and in the event of a failure to do so, or to carry out any instruction of the governor in respect to the enforcement of said laws shall be guilty of a misdemeanor in office and may be punished, on conviction, by a fine of not exceeding fifty dollars and by imprisonment not exceeding twelve months at hard labor for the county, to be fixed in the discretion of the court or judge trying the case.

"§ 260. Governor may appoint inspectors, secret service men, to offer rewards for conviction of persons violating prohibition laws.—The governor may appoint and employ subject to the provisions of the merit sys-

tem, such inspectors or secret service men, or, such other persons as he may deem necessary for the purpose of detecting and reporting upon violations of the prohibition laws, or any of them, and to contract with them for reasonable compensation to be paid by the state for their services. He may also offer a reward to all sheriffs, constables or other persons in his discretion, who will bring about the conviction of any person for the violation of said laws, and particularly for the violation of the laws against the manufacture of prohibited liquors, and may state the amount that will be paid out of the state treasury to any officer or person who may secure the conviction of any one guilty of the offense of illicit distilling or other violation of said laws, and in the event such reward or rewards are earned the same shall be paid by warrant drawn by the comptroller upon the state treasury or the law enforcement fund therein, provided by this chapter, as the governor decides, upon a bill presented against the state for the reward, stating the facts and circumstances which the claimant puts forward as entitling him to the reward, when the said bill is certified and approved as being correct by the attorney-general of the state, and is also approved by the governor."

Under Section 259, supra, the Governor, in order to carry out the duties imposed by Section 120 of the Constitution, may appoint such officers as he deems necessary to promote temperance and suppress the evils of intemperance. The officers so appointed by the Governor are amenable only to the Governor. It is further provided in Section 260, supra, that the Governor may employ, subject to the provisions of the Merit System, such inspectors or secret service men, or **such other persons** as he may deem necessary for the purpose of detecting and reporting upon all violations of the prohibition laws and to contract with such persons for their compensation, such compensation to be paid by the State.

Under Section 6, subsection (h) of the original Alcoholic Beverage Control Act, the Board was granted authority to appoint officers, agents and employees, and to fix their salaries or remuneration. Upon the codification of this Act into the 1940 Code, the Code Committee rewrote Section 6(h) of the original Act to conform to the Merit System Act, which was subsequently enacted, and as changed the Board retained authority to appoint all officers, agents, and employees of the Board, subject to the provisions of the Merit System. That provision is found in Section 5 of Title 29, Code of Alabama 1940.

Sections 259 and 260, supra, were originally enacted in 1919 and were brought forward into the 1940 Code with such changes as were necessary to make the powers of appointment subject to the Merit System.

The preamble to the original Alcoholic Beverage Control Act denotes the purpose of the Act in that it was enacted to promote temperance and suppress the evils of intemperance. Under Sections 259 and 260, supra, it is significant that the same purpose of promoting temperance and suppressing the evils of intemperance was also in the minds of the Legislature.

Under the present law, there are two appointing powers, one, the Board, and the other, the Chief Executive. The powers and duties of each have their own field of operation, but the powers and authority of the Board is confined to the Act alone insofar as is necessary to carry out the provisions of the

law, whereas the power of the Governor is found in the Constitution and also by the express will of the Legislature. Neither of these appointing powers can legally usurp the power and authority of the other.

Moreover, the power delegated to the Board to employ agents and employees as may be necessary to perform the duties of the Board under the Act cannot be delegated by the Board, either directly or by implication, to another because the authority of the Board in this regard is quasi judicial in its character. This principle of law is stated in 42 **American Jurisprudence,** page 387, Section 73. This clearly leaves the power of appointment in the Board should they see fit to exercise it.

Coming directly to the first question presented by your inquiry, it is my opinion that while the power of the Board in this respect may not be delegated to the Governor or to any other State agency, the powers invested in the Governor by the Constitution as well as the Sections hereinabove referred to leaves the matter of appointment open for the Governor to coordinate the law enforcement agencies of the State in the manner outlined in your Executive Order. Therefore, the Governor has the power to consolidate the various law enforcement officers of the State mentioned in the Executive Order.

Answering your second inquiry, in my opinion the wording of the Executive Order is sufficient to accomplish the purpose set out therein.

In answer to your third inquiry, it is my opinion that the proposed resolution of the Alabama Alcoholic Beverage Control Board attached to your inquiry is not proper and would be in contravention of the principle that power delegated by the Legislature to a board to exercise quasi judicial functions cannot be sub-delegated by the board.

In answer to your fourth inquiry, it is my opinion that the agents and employees appointed by the Governor under his Executive Order and assigned to the Alabama Alcoholic Beverage Law Enforcement Division of the Department of Public Safety may be paid from the funds of the Alabama Alcoholic Beverage Control Board designated as the Store Fund of said Board. However, in view of the provisions of Section 9, Title 29, Code of Alabama 1940, which require that all claims against the moneys received under the provisions of the Alcoholic Beverage Control law "shall be first audited and approved by the Board or its designated agency," It is necessary that the Board by proper resolution designate an agency to audit and approve claims against the funds of the Board arising from the Alcoholic Beverage Law Enforcement Division. I suggest that the agency so designated be the Director of Public Safety.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 26, 1945.

Hon. J. C. McGough,

Judge of Probate,

Fayette County,

Fayette, Alabama.

Code 1940, Title 12, Sections 79, 80—County Finance Control Act.

1. The judge of probate or chairman of the board of revenue is authorized to employ an assistant to keep the records required to be kept of the financial status of a county under Sections 79 and 80, Title 12, Code 1940, but the amount of such assistant's compensation should be approved or provided for by the county governing body itself.

2. Such an assistant may also be employed by the judge of probate to do other work in his office provided the compensation for such additional work is separately paid.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of November 20, 1945, is as follows:

"Please render, at your earliest convenience, your official opinion on the following:

"(1). Who is responsible for the keeping of the records prescribed in Title 12, Section 80, Code of 1940? If your answer is that it is the responsibility of the Judge of Probate or Chairman of the Board, then does it follow that the responsible party can enter into an agreement with the party or parties employed to pay reasonable compensation for the work of keeping this record as provided in said section?

"(2). If the services of a part time clerk should be required in the keeping of the records referred to in the foregoing question, would there be any legal reason why this clerk could not be employed to work in the office of a judge of probate who receives his compensation on a fee basis for the time that the clerk is not actually employed in keeping the records prescribed in the foregoing section?"

In an opinion rendered September 16, 1937, to Judge of Probate, Houston County, Biennial Report, Attorney General 1936-1938, page 374, this office held that the judge of probate or chairman of the board of revenue is authorized to hire an assistant to keep the records required to be kept under Sections 79 and 80, Title 12, Code 1940.

Section 80, however, among other things, provides that the county governing body "shall provide for the payment of reasonable compensation for the work of keeping this record." I am of opinion, therefore, that although the judge of probate is authorized to employ such assistant, the amount of his compensation should be approved, or "provided for" by the governing body itself.

I see no reason why an assistant or employee is not also eligible for employment as a clerk in your office to do such other work that you may require, assuming that your services are compensated on a fee basis. The amount of compensation for such additional duties as the assistant keeping the record is paid, with the approval of the county governing body, should be paid separately, of course.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

November 29, 1945.

Hon. F. G. Nunnelley, Chairman,

Calhoun County Commission,

Anniston, Alabama.

Title 12, Section 12, Code of Alabama 1940, as amended by Act No. 344, 1945 Legislature—Court of County Commissioners has no authority to contribute to War Memorial Building Fund.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of November 21, 1945, is as follows:

"The citizens of Calhoun County, Alabama, are raising a fund by public subscription for the purpose of building and constructing at Anniston a building to be known as the 'War Memorial Building' as a memorial to the Calhoun County veterans who served or who died in the last World War.

"The County Commission of Calhoun County has been called upon to contribute to said fund out of the county treasury of Calhoun County. In your opinion has the County Commission of Calhoun County the authority to make a contribution to said building out of the funds in the county treasury of this county?

My answer to your question is in the negative.

I find no authority of law for your County Commissioners to make such appropriation. Courts of county commissioners and boards of revenue are created by statute and have only such powers as are conferred upon them by law. Worthy as the cause may be, I find no authority for the county to contribute county funds to a War Memorial Building Fund. Biennial Report, Attorney General, 1932-34, p. 462; Quarterly Report, Attorney General, Volume 3, p. 45; Biennial Report, Attorney General, 1928-30, p. 809.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 4, 1945.

Hon. Eugene B. Henry,

Commissioner of Licenses,

Jefferson County,

Birmingham, Alabama.

Vending Machines—Licenses—Revenue Schedule 613, Title 51, Code 1940 construed.—Veterans' Exemptions—

Veterans held not exempt from payment of license on vending machines, levied by Schedule 613, Title 51, Code 1940.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for an official opinion bearing date of November 27, 1945, is as follows:

"Please advise me, if under Veterans Act passed at regular Session, H. 352, approved July 6th, 1945, a Veteran would be entitled to exemption for operating a vending machine, as provided under schedule 613, title 51, 1940 Code of Alabama.

"Under a ruling made to E. W. Long, Judge of Probate, Walker County, Alabama on November 21, 1931 it was held that the exemption allowed to Veterans did not apply to Pool Tables, as the license is on tables and not person. If this ruling still holds it seems to me it would also apply to Vending Machines.

"Please advise on this question at your earliest convenience."

In reply I wish to advise that in my opinion the license here levied is upon the machine itself and not upon the business of selling a product dispensed by the machine. This holding has been the law of Alabama since 1918 when the Court of Appeals of this State in the case of Dunlap v. State, 16 Ala. App. 440, 78 So. 683 (Cert. Denied 202 Ala. 698, 80 So. 893) construing a similar statute said:

> "Section 1, subsec. 62, of the revenue law (Acts 1915, p. 509) provides a license 'for each penny-in-the-slot machine $5.00.'"

And continued:

> "The license is not upon chewing gum nor upon dealers in chewing gum, but upon penny-in-the-slot machines, for whatever purpose or purposes they may be operated."

The question of engaging in the business of selling any particular product or products which may be dispensed through vending machines is not here considered, but the Veterans' exemptions of Act No. 353, House Bill 352, approved July 6, 1945, do not appear to go further than to grant such exemptions to occupations and business licenses. (See Section 2 of Act 353, House Bill 352, approved July 6, 1945.)

Premises considered, it is my opinion that no exemption is granted to veterans from the payment of the license levied upon vending machines by the provisions of Schedule 613, of Title 51 of the Code of 1940.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 20, 1945.

Hon. E. G. Caldwell,

License Inspector,

Chilton County,

Pletcher, Alabama.

Contractor's License—Code 1940, Title 51, Schedule 42, Section 496, construed—Licenses—

Employee of owner acting as "foreman" of construction on monthly salary, not liable for contractor's license under schedule 42, Section 496, of Title 51, Code of Alabama, 1940.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for an official opinion, bearing date of December 7, 1945, is as follows:

"Will you please advise me whether or not under the following state of facts, there would be due a contractors license, under Section 496, Schedule 42. A owner of a lot in the City of Clanton, employes a man who does considerable construction work to erect a building for him, under the following circumstances, that is, the owner of the land pays to this man the sum of $150.00 each month, as a straight salary, during the course of the construction and erection of this building. This man generally supervises the construction and erection of this building, as well as hires and fires the labor to be used in the construction of the building, and in general supervises and oversees the construction of the building. He carries, at stated times, to the owner, a statement of all wages and the owner himself pays to the laborers the amount of their wages.

"As I understand the compensation due to this man for erecting the building is a straight salary of $150.00 a month.

"I trust I have given you sufficient facts upon which to base your opinion in this case, and I would appreciate your opinion at your earliest opportunity."

In my opinion your request must be answered in the negative.

Under your statement of facts it appears that the individual concerned is an employee of the owner of the property and acting in the capacity of what is commonly termed "a foreman" of the work to be done. The owner evidently retains complete authority to discharge the "foreman" at any time, and his services are not guaranteed to perform to completion any particular job. These facts being true, the construction of the building concerned and all work on it, is under complete control of the owner at all times. The fact that he may delegate to his foreman the duty of supervising the work of the other employees does not thereby constitute the foreman a contractor.

This situation is not clearly covered by the license schedule concerned. If this "foreman" is to become liable for the contractor's license here named it must be by inference. This is untenable since construction of taxing statutes must be liberally done, favoring the taxpayer, and the liability attaches only when the clear and concise language of the statute imposes it. **State v. Dr. Pepper Bottling Co.**, 155 So. 92, 26 Ala. 125, cert. den. 155 So. 93, 228 Ala. 607; **Williams v. Pugh**, 129 So. 792, 24 Ala. App. 57; **Carruth v. State**, 132 So. 65, 24 Ala. App. 158.

The pertinent provisions of law appeared substantially as Schedule 42 of Section 348 of the Revenue Act of 1935, and was considered in an opinion of the Attorney General addressed to Hon. E. C. Whelan, License Inspector, Jefferson County, Birmingham, Alabama, under date of October 31, 1938. (Quarterly Report, Volume XIII, page 54).

In this opinion the question of whether a real estate company developing its own property although building houses according to plans approved by a prospective purchaser was considered, and they were held not liable for the license.

In my judgment the same reasoning is pertinent to your inquiry, and under your statement of facts no liability for contractor's license attaches under the provisions of law considered.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

December 20, 1945.

Hon. G. Claiborne Blanton,

Judge of Probate,

Dallas County,

Selma, Alabama.

Courts of County Commissioners—Counties—Travelling Expenses.

Travelling expenses of county officials and employees incurred in attending the annual convention of the National Association of County Officials at which convention matters concerning the construction and maintenance of public roads are considered, may be paid from the county road and bridge fund, where such expenses are authorized by proper resolution of the county governing body.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for an official opinion, bearing date of December 1, 1945, is as follows:

"The National Association of County Officials holds an annual convention each year and meetings in different cities over the country and particularly Washington, D. C., which the Chairmen and Commissioners of County Boards of Revenue or like governing bodies in Alabama are requested to attend for the purpose of promoting here in Alabama construction and maintenance of good roads by means of educational lectures, exhibits and dissemination of information for the main economical maintenance and construction of roads and bridges. Appearances are made before committees of the Congress to secure appropriations for 'farm to market' roads, to secure tractors and trucks, graders, shovels and other road building machinery from the Surplus Property Division

of the Government and in general to secure any other benefits that would appear to be advantageous for the construction and maintenance of the roads and bridges of the several counties of the State of Alabama.

"Your official opinion is requested as to the legality of the reimbursement of any county officer or employee for his actual expenses when traveling out of the county on official business that has been duly authorized by the Commissioners' Court or Board of Revenue, which would include expenses to the conventions and meetings above referred to."

The question presented by your inquiry is analogous to the question considered by this office in an opinion to Hon. J. W. Heustess, Clerk of the Board of Revenue, Montgomery County, under date of May 10, 1935, and found in Biennial Report of the Attorney General 1934-36, page 160, in which it was held that by appropriate resolution of the governing body, the necessary expenses of its members incurred in attending a meeting of the Association of County Commissioners of Alabama could be paid from the road and bridge fund of the county, when the purpose of the meeting was to promote the construction and maintenance of public roads and bridges by means of educational lectures, exhibits, and demonstrations to be had at such meetings. This opinion was founded on an opinion rendered by this office to the clerk of the Board of Revenue of Montgomery County under date of June 25, 1930, in which it was held:

"Section 1347, Code of Alabama, 1923 (Title 23, Section 43, Code of Alabama 1940), provides that the board of revenue or court of county commissioners has the power and authority to do all things needful and necessary in and about the construction and maintenance of public roads. By said Act the several county boards are vested with general superintendence of the public roads, bridges and ferries within their respective counties, and may establish new, and change and discontinue old roads, bridges and ferries so as to render travel over same as safe and convenient as practicable. To this end said Boards are given 'legislative, judicial, and executive powers' except as is limited in the Act, and for the purposes named in the Act have 'unlimited jurisdiction and powers.' They have the power and authority to pay all expenses necessary to obtaining information that may serve to better qualify said Boards to intelligently study said road matters."

Se also Quarterly Report, Volume 20, page 37, Quarterly Report, Volume 31, page 54.

In view of the conclusions reached in the above referred to opinions, it is my opinion that the county may legally reimburse an officer or employee of the county for his actual expenses incurred in attending the National Association of County Officials, when authorized by proper resolution of the county governing body. I might add that such expenses are not payable out of the general fund of the county (Quarterly Report, Volume 31, page 54), but are payable from the public road and bridge fund (Biennial Report of the Attorney General 1934-36, page 160).

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

QUARTERLY REPORT, ATTORNEY GENERAL
OCTOBER 1, 1945, through DECEMBER 31, 1945

INDEX TO VOLUME 41

Page

ACTS (GENERAL AND LOCAL):

GENERAL ACTS 1945:

No. 104 16
No. 173 5
No. 211 22
No. 344 41
No. 484 16

LOCAL ACTS 1939:

Page 298 9

ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD:

Authorized to pay claims arising from operation of Alcoholic Beverage Law Enforcement Division 37

AMERICAN LEGION:

Taxation—Exemption 14

BOARD OF REGISTRARS:

Mobile County—Clerk, Board of Registrars—Appointment—Subject to Mobile County Civil Service 9

CODE OF ALABAMA 1940:

TITLE 10:

Sections 124, et seq. 24

TITLE 12:

Section 7 26
Section 12, as amended 42
Sections 79 and 80 41

TITLE 17:

Section 55 9

TITLE 23:

Section 43 46

TITLE 29:

Section 9 37
Sections 259 and 260 37

TITLE 35:

Section 12 29
Section 37 29

INDEX—Continued

Page

TITLE 51:

Section 2(c) 14
Sections 124, et seq. 14
Section 496 44
Section 613 43
Section 753 7

TITLE 52:

Section 47 12
Section 76 12
Section 209(2b) 12

TITLE 55:

Section 301, as amended 5

TITLE 62:

Section 37 9

CONSTITUTION 1901:

Section 93, as amended 22
Section 94 24
Section 120 37
Section 150 ..... 16, 29
Section 280 29

CONSTITUTIONALITY:

Act No. 211, General Acts 1945, authorizing establishment of public hospitals constitutional 22
Act No. 484, General Acts 1945,—Provision in reference to decrease of county's contribution to salary of circuit judges unconstitutional 16

COUNTIES:

Financial Control Act—Assistant may be employed to keep records—Compensation to be approved by county governing body 41
Museums organized under Title 10, Section 124, et seq.—May not appropriate money to 24
Officials and employees—Traveling expenses attending National Association of County Officials payable from road and bridge fund 46
War Memorial Building Fund—No authority to contribute to 42

COUNTY BOARDS OF EDUCATION:

Lunch room equipment—May expend funds for 27
Transportation within two miles of school—Expense of not a factor in making allotment from minimum program fund 12

COURTS OF COUNTY COMMISSIONERS:

Financial Control Act—Assistant employed to keep records—Employment by judge of probate for other work 41
Member, by refusal to accept compensation, not eligible to hold another office 26

INDEX—Continued

Page

Museums organized under Title 10, Section 124, et seq.—May not appropriate money to 24
No authority to grant member leave to accept employment by county 26
Officials and employees—Traveling expenses attending National Association of County Officials payable from road and bridge fund 46
War Memorial Building Fund—No authority to contribute to 42

DEPARTMENT OF REVENUE:

Sales tax—Tokens—May discontinue use of—No authority to establish "a bracket system" 7

EXEMPTIONS:

American Legion—Taxation—Exemption from 14
Veterans—Vending machine license—not exempt from 43

GOVERNOR:

May establish under Dept. of Public Safety the Alcoholic Beverage Law Enforcement Division 37
May, by executive order, coordinate law enforcement agencies of State under Dept. of Public Safety 37

HEALTH AND HEALTH DEPARTMENT:

Public hospitals—Act No. 211, Gen. Acts 1945, authorizing establishment of—Constitutional 22

HOSPITALS:

Public—Act No. 211, General Acts 1945, authorizing establishment of—Constitutional 22

JUDGES:

Circuit—Provision of Act No. 484, Gen. Acts 1945, in reference to decrease of county's contribution to salary of—Unconstitutional 16

JUDGES OF PROBATE:

Financial Control Act—Assistant to keep records—Employment by for other work 41
Financial Control Act—May employ assistant—Compensation to be approved by county governing body 41

LICENSES:

Contractors—Employee of owner acting as foreman of construction on salary basis—Not liable for 44
Vending machines—Veterans not exempt from 43

MERIT SYSTEM:

Mobile county—Clerk Board of Registrars—Appointment subject to 9
State Service Commissioner and assistants—County and district service commissioners not subject to Merit System 5

MILITARY AND NAVAL AFFAIRS:

Army officer on terminal leave—Resumption of former civil office—May receive pay from State while receiving pay from Federal Government 29

INDEX—Continued

Page

MOBILE COUNTY:

Clerk, Board of Registrars—Appointment—Subject to Mobile County Civil Service 9

MUNICIPALITIES:

Museums organized under Title 10, Section 124, et seq.—May not appropriate money to 24

OFFICERS AND OFFICES:

Army officer on terminal leave—Resumption of former civil office—May receive pay from State while receiving pay from Federal Government 29

PUBLIC SAFETY DEPARTMENT:

Alcoholic Beverage Law Enforcement Division—Claims for operation of may be paid from funds of Alcoholic Beverage Control Board 37

Governor may establish Alcoholic Beverage Law Enforcement Division under 37

SALES TAX:

Tokens—Department of Revenue may discontinue use of—No authority to establish "a bracket system" 7

SCHOOLS:

County boards of education—Transportation within two miles of school—Expense of not a factor in making allotment from Minimum Program Fund 12

Lunch room equipment—County board of education authorized to expend funds for 27

STATE SERVICE COMMISSIONER:

First assistant and additional assisants—County and district service commissioners not subject to Merit System 5

TAXATION:

American Legion—Exemption from 14

Sales tax—Tokens—Department of Revenue may discontinue use of—No authority to establish "a bracket system" 7

TRAVELING EXPENSES:

County officials and employees—Attending National Association of County Officials payable from road and bridge fund 46

VETERANS:

State Service Commissioner and assistants—County and district service commissioners not subject to Merit System 5

Vending machine license—Not exempt from 43